

Editor's note: Reconsideration granted; decision reaffirmed as clarified by order dated June 2, 1981 -- See 54 IBLA A through E below: appealed - remanded in part to IBLA for hearing, No. 134-81 (Ct. Cl. Jan. 31, 1986)

GREGORY LUMBER CO., INC.

IBLA 79-127

Decided April 30, 1981

Appeals from decisions of the Bureau of Land Management District Manager, Eugene, Oregon, denying requests for refunds of purchase price of timber sale contract Nos. 36090-TS5-49, OR090-TS6-18, OR090-TS6-60, OR090-TS7-8.

Affirmed in part, reversed in part, and remanded.

1. Timber Sales and Disposals

Under a lump sum contract for a designated lot of timber in a described area, the contract price does not vary with the quantity or quality of timber actually located therein. The phrase "more or less" in these contracts will be given its plain and literal meaning.

2. Timber Sales and Disposals

Where a contract for the sale of timber contains a disclaimer of warranty by the vendor as to the quantity of timber sold, the parties are deemed to have contracted on the assumption that there was doubt as to the quantity, and the risk with respect to such factor must be considered to have been assumed by the purchaser as one of the elements of the bargain. Thus, the fact that the quantity of timber available for harvesting turned out to be less than was expected at the time of contracting is not a basis for a claim to a refund.

3. Timber Sales and Disposals

In legal effect, a vendor's estimate of quantity or quality of a specific lot of timber is sui generis because it cannot be determined with certainty except by harvesting and, even then, there is room for disagreement as to whether all merchantable timber was harvested by the vendee.

4. Timber Sales and Disposals

Where warranty as to quality and quantity is specifically disclaimed by the Government in a timber cruise sale contract, only good faith is required of the Government in naming an estimated amount.

APPEARANCES: Edward F. Canfield, Esq., Washington, D.C., for appellant; Donald P. Lawton, Esq., Assistant Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Gregory Lumber Company, Inc., appeals from four decisions of the Bureau of Land Management (BLM) District Manager, Eugene, Oregon, dated November 20, and 21, 1978, denying its request for refunds of part of the purchase prices of timber sale contract Nos. 36090-TS5-49 (Fish Creek), OR090-TS6-18 (Salmon Creek), OR090-TS6-60 (Rat Creek), and OR090-TS7-8 (Poodle Creek). Consideration of these appeals had been stayed pending a decision by the Interior Board of Contract Appeals, to which appellant also appealed, on whether or not that Board was vested with jurisdiction over this matter.

The jurisdictional controversy was generated by the enactment of the Contract Disputes Act of 1978, 92 Stat. 2383, 41 U.S.C. §§ 601-613 (Supp II 1978). Prior to passage of the Act, disputes arising out of timber sales conducted by BLM on Oregon and California revested lands (O & C lands) were decided finally for the Department by this Board. Section 3 of the Contract Disputes Act, however, provides in relevant part: "(a) Unless otherwise specifically provided herein, this chapter applies to any express or implied contract * * * entered into by an executive agency for- * * * (4) the disposal of personal property." 41 U.S.C. § 602(a)(4) (Supp. II 1978).

Traditionally, under Oregon law, a conveyance of standing timber was a conveyance of an interest in real property. See Seguin v. Maloney, 253 P.2d 252, rehearing denied, 256 P.2d 514 (1953). In 1973,

however, the State of Oregon adopted the 1972 Amendments to the Uniform Commercial Code (U.C.C.) which provided: 1/

A contract for the sale apart from the land * * * of timber to be cut is a contract for the sale of goods within this section whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting * * *.

Or. Rev. Stat. § 71.1070(2).

The provisions would seem to indicate clearly that appeals relating to timber sale contracts should be pursued under the strictures of the Contract Disputes Act. However, the legislative history of section 3 of the Act cast some doubt on this interpretation.

S. Rep. No. 95-1118, 95th Cong., 2nd Sess. (1978), which accompanied S.3178, the basis of the Contract Disputes Act, discussed in some detail its applicability:

Contracts for the disposal of personal property are included within the coverage of the bill even though they are for the sale rather than the procurement of property. These contracts are generally referred to as "surplus sales" contracts.

The General Services Administration has cognizance over all such sales. Under its personal property management regulations Federal agencies currently include the standard disputes clause in contracts for the disposal of personal property. (Standard form 114C, Sale of Government Property - General Sales Terms and Conditions (January 1970 edition), prescribed by GSA regulations, 41 CFR 101-45.304-8(c)(4), for all sales of personal property, includes the standard disputes clause.)

The inclusion of the disputes procedure in disposal contracts has worked well for many years and justifies its incorporation into the bill. Moreover, the omission of contracts for the disposal of personal property from section 3 of the bill might be construed to imply a congressional intention to exclude personal property disposal

1/ We would point out that until 1972, section 2-107(1) of the U.C.C. provided that the sale of standing timber was a sale of personalty only if it was to be severed by the seller. This was changed in 1972 to reflect a growing trend in timber producing states to treat a sale of standing timber, regardless of whether it was to be severed by the buyer or seller, as a sale of personal property. Some states, however, such as Idaho, continue to differentiate between sales where the buyer severs and those where the seller severs. See, e.g., Idaho Code 28-2-107(1).

contracts from the blanket coverage of the bill notwithstanding current agency requirement to treat such disputes in the same manner as procurement disputes. Since no such exclusion is intended, contracts for the disposal of personal property were made expressly covered by the bill. [Emphasis supplied.]

S. Rep. No. 95-1118 at 18-19.

Certain observations should be made. Timber sales in the Department of the Interior have never been conducted pursuant to the personal property management regulations of GSA. Thus, timber sale contracts have not, in the past, contained a contract disputes clause. On the contrary, clause 37 of the BLM timber sale contract form expressly provides for an appeal to the Board of Land Appeals.

Part 101-45 of the GSA regulations, referenced in the Senate Report, is expressly applicable only to the extent provided in the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. §§ 471-493 (1976). The definition of property in that act expressly excludes the public domain; lands reserved or dedicated for national forest or national park purposes; or minerals in lands or portions of lands withdrawn or reserved from the public domain as well as the lands themselves. 40 U.S.C. § 472(g) (1976).

The Federal Land Policy and Management Act of 1976, 90 Stat. 2744, 43 U.S.C. §§ 1701-1782 (1976) directs BLM to achieve and maintain a high-level annual or regular periodic output of the renewable resources, such as timber, on the Federal lands. See section 202(c)(1), 43 U.S.C. § 1712(c)(1) (1976). In the revested O & C, as well as the Coos Bay Wagon Road (CBWR) lands, timber is sold pursuant to the Act of August 28, 1937, 50 Stat. 874, 43 U.S.C. § 1181(a) (1976); on other public lands it is sold pursuant to the provisions of the Act of July 31, 1947, 61 Stat. 681, 30 U.S.C. § 601 (1976). The sale of timber from O & C lands is part and parcel of its affirmative statutory obligation; it is not the disposal of personal property under a "surplus sales" contract.

Thus, very real questions exist concerning the proper forum to adjudicate this appeal. It is not necessary, however, to decide this question. In its decision, styled Appeals of Gregory Lumber Co., Inc., 13 IBCA 71 (1979), the Interior Board of Contract Appeals noted that section 16 of the Contract Disputes Act permits a contractor to elect to proceed under the provisions of the Contract Disputes Act "with respect to any claim pending [on March 1, 1979] before the contracting officer or initiated thereafter." Inasmuch as the contracting officer had issued the decisions being appealed on November 20 and 21, 1978, the Board of Contract Appeals held that appellant could not elect to proceed under the Act. It is thus unnecessary to further examine the

scope of section 3. 2/ See also Appeals of Gregory Lumber Co., Inc., 13 IBCA 128 (1980).

Appellant based its demands for refunds on allegations that the amount of timber cut from each tract was substantially less than the Government estimate, that the quality or marketable timber was less than could be anticipated, and that the prices charged for additional authorized cutting were in excess of the contract price. Under contract No. 36090-TS5-49 (Fish Creek) appellant also demanded a refund for making road improvements in excess of those required. 3/ The refunds were denied because the District Manager found no errors in the cruise data and volume computations for the sales. The contracts involved were lump sum contracts in which the purchase price was not contingent upon the volume of timber recovered by the purchaser, and the contract terms specifically disclaimed any warranty as to the quantity and quality of timber sold. Refund was also denied for road improvements as the District Manager found that the contract did not specify the yardage of crushed rock required, that appellant chose to overbuild the turnouts, and that appellant used extra rock for its own convenience.

These contracts and sale notices are substantially identical to those generally used by BLM. The notices state:

THE VOLUMES LISTED herein are estimates only. * * * No sale shall be made for less than the advertised appraised price. The purchaser shall be liable for the total purchase price, without regard to the amount bid per unit even though quantity of timber actually cut or removed or designated for taking is more or less than the estimated volume, or quantity so listed. [Emphasis added.]

Both the actual contracts and the sale prospectus state:

The following estimates and calculations of value of timber sold are made solely as an administrative aid for determining: (1) adjustments made or credits given in accordance with Secs. 6, 9, or 11; (2) when payments are

2/ While a number of decisions by Department of Agriculture's Board of Contract Appeals have held that timber sales are within the ambit of the Contract Disputes Act, not one has ever examined the legislative history of the Act. See Summit Contractors, AGBCA No. 31-136-1, 81-1 BCA par. 14,872; Tellico Lumber Co., AGBCA No. 80-149-3, 80-2 BCA par. 14,787; Sierra Pacific Industries, AGBCA No. 79-200 CDA, 80-1 BCA par.14,383; All-American Plywood Co., AGBCA No. 79-147 CSA, 80-1 par. 14,189; Southwest Forest Industries, AGBCA No. 77-180, 79-1 BCA par. 13,788.

3/ Appellant asserts that the contract called for 34,555 cubic yards of rock for road building and maintenance, but that BLM required it to place 39,855 cubic yards of rock on the road, which it did under protest. Included in this claim was a request for compensation for expenditures occasioned by a rock slide, which is discussed infra.

due; and (3) value of timber subject to any special bonding provisions. Except as provided in Sec. 2, Purchaser shall be liable for total purchase price even though quantity of timber actually cut or removed or designated for taking is less than the estimated volume or quantity shown.

Additionally, the contract contained the following provisions:

Sec. 6. Inspection of Timber and Disclaimer of Warranty

(a) Purchaser warrants that this contract is accepted and executed on the basis of its examination and inspection of the timber sold under this contract and its opinion of the value thereof. [Emphasis added.]

(b) Government expressly disclaims any warranty of fitness of the timber for any purpose, all timber sold hereunder is accepted As Is without any warranty of merchantability by Government. Any warranty as to the quantity or quality of the timber sold hereunder is expressly disclaimed by Government. [Emphasis in original.]

The appendix attached hereto sets forth the estimates made by BLM and the recoveries claimed by appellant. BLM attributes the discrepancy to "substantial differences * * * between BLM cruising and scaling standards" and those relied upon by appellant utilized by the Columbia River Scaling and Grading Bureau, and to the selective harvesting methods of appellant.

On appeal, appellant points out that the notice of sale was very specific as to the amount of timber available, and supposedly based on a 100 percent cruise. ^{4/} The language making purchaser liable for the total bid regardless of whether actual harvest was "more or less" than set forth did not, in appellant's view, warn the public that "there could be an unrestricted limitless deviation between the estimate and the actual amount of timber recovered." Appellant urges that instead, this language "reassures the public that there will be no substantial variation." Appellant would interpret the phrase "more or less" to require the estimates to be very close to the amount of timber recoverable.

Appellant argues that BLM's reliance on its estimates in determining the prices, bonds, and other contract terms negates the proposition that these were lump sum contracts. It states that it relied on these estimates in good faith in making its bids and was injured thereby.

^{4/} Appellant notes, however, that the Douglas fir offered in No. 36090-TS5-49 was estimated not by a 100 percent cruise, but by the 3P system (Probability Proportioned to Production) to select sample trees. Appellant's criticism of this method of estimating quantity is discussed, infra. The western hemlock and western red cedar involved in this sale were the subject of a 100 percent cruise.

Appellant asserts that the differences in cruising methods cited by the District Manager's decision are not significant and could not have caused the deficiencies in volume. Appellant states that BLM's own procedures required it to use the scaling method of calculating volume because the timber was highly defective.

Appellant makes specific reference to the fact that the amount of the performance bonds and the method of payment (set forth in section 3 and exhibit B of the contracts) were themselves dependent upon BLM's estimates of the quantity of merchantable timber. Appellant also notes that the various modifications made in the timber contracts valued the timber at a considerably higher rate than that provided in the sales agreement and that this valuation has never been explained.

With particular reference to the Fish Creek sale (contract No. 36090-TS5-49), appellant seeks refund of a road usage fee and compensation for added mileage and time lost due to a rock slide which rendered a road impassable. It places responsibility for the slide on BLM. Appellant also claims compensation is due for providing crushed rock for roads in excess of that required by the contract.

Appellant requests the Board find BLM breached the contract by not designating a sufficient volume of timber to fulfill to a reasonable degree the estimated timber recovery. Appellant asserts that the disclaimers of warranty are null and void as unreasonable, unfair, and against public policy. Appellant asks that additional timber be made available for cutting in the contract areas at the contract prices and that the prices paid in excess of the contract prices for previous additions be refunded to it. Finally, appellant requests that the case be referred to an Administrative Law Judge for a hearing.

[1] The Instructions to Bidders as stated on form No. 5440-9 and supplied to appellant with the notices of sale is labeled "Deposit and Bid for Timber. Lump Sum Sale." The contracts are styled "Contract for the Sale of Timber. Lump Sum Sale." A lump sum sale is a sale of a designated lot of timber in a described area, and the contract price does not vary with the quantity or quality of timber actually located therein. Russell & Pugh Lumber Co. v. United States, 290 F.2d 938 (Ct. Cl. 1961); Lloyd L. Clark, 17 IBLA 201, 81 I.D. 546 (1974); Irvin Pearce, 5 IBLA 373 (1972); Main Lumber Co., A-30200 (July 7, 1964). Although the contracts refer to estimates of thousands of board feet of merchantable timber, as set out above, they clearly state that the estimates are solely an administrative aid and that purchaser is liable for the total purchase price even though the quantity of timber actually available varies from the estimate.

With respect to appellant's arguments on the proper interpretation of the phrase "more or less," we wish to make two separate points. While there is, indeed, a general rule of contract construction that qualifying words such as "about" or "more or less" are designed to cover accidental variations arising from slight or unimportant excesses or shortages, there is also a well known exception to this rule. As the United States Supreme Court noted in Brawley v. United States, 96 U.S.

(6 Otto) 168, 172 (1878), if qualifying words, such as "more or less" are "supplemented by other stipulations or conditions which give them a broader scope or a more extensive significance, then the contract is to be governed by such added stipulations or conditions."

The various prospectuses, wherein the words "more or less" appeared, specifically noted that the volumes listed "are estimates only." Section 6(b) of the contract expressly disclaimed any warranty of fitness or quantity, while section 6(a) was a warranty that the purchaser accepted the contract on the basis of its own examination. Exhibit B, which is the only part of the contract which mentions volumetric recovery, notes that

[t]he following estimates and calculations of value of timber sold are made solely as an administrative aid for determining: (1) adjustments made or credits given in accordance with Secs. 6, 9, or 11; (2) when payments are due; and (3) value of timber subject to any special bonding provisions. Except as provided in Sec. 2, Purchaser shall be liable for total purchase price even though quantity of timber actually cut or removed or designated for taking is less than the estimated volume or quantity shown.

The totality of additional conditions, disclaimers, and stipulations makes it clear that a restrictive reading of the words "more or less" would damage the contract, taken as a whole. See Russell & Pugh Lumber Co. v. United States, supra. 5/

5/ While the decision of the Court of Claims in Rupley v. United States, 124 Ct. Cl. 59, 62 (1952), held in the context of a sale of dead and damaged timber that "we are inclined to the view that the term more or less as used in the particular setting was intended to cover minor errors" citing Pine River Logging & Imp. Co. v. United States, 186 U.S. 279 (1902). That case is distinguishable on its facts. The crucial point in Rupley was that the court of claims expressly found that the sale contract included both high risk trees and trees which had suffered fire damage in a virgin growth area. These, the Court found, the forest ranger declined to have marked or cut. This breach brought the sale directly within the restrictive confines of "more or less" as defined by the Supreme Court in Pine River, supra. In Pine River, the Court first took note of the doctrine established in Brawley v. United States, supra, and then stated:

"But, upon the other hand, if the agreement be to manufacture, furnish or deliver certain property not then in existence, or to be taken from a larger quantity, the addition of the words "more or less" will be given a narrow construction, and held to apply only to such accidental or immaterial variations in quantity as would naturally occur in connection with such a transaction." [Emphasis supplied.]
186 U.S. at 289.

In Rupley, the Court of Claims held, in effect, that to the extent timber, which met the contract specifications, was available, the Government's failure to permit recovery allowed the appellant to recover.

In any event, we fail to see how any of the traditional modes of analysis of the words "more or less" are relevant herein. The prospectuses did not indicate, for example, that there were 8,021 Mb.f. of Douglas fir, more or less. Rather, the only place the words were used is in the following sentence: "The purchaser shall be liable for the total purchase price, without regard to the amount bid per unit, even though the quantity of timber actually cut or removed or designated for taking is more or less than the estimated volume or quantity listed." In this sentence "more or less" is not a modifier of quantity; rather, it serves as a predicate adjective to describe, not limit, the consequences that would flow from either shortage or overage. Thus appellant's argument is inapposite. ^{6/}

[2] The Board has held that where the contract of sale contains a specific disclaimer of warranty by the vendor (Government) as to the quantity of timber sold, the parties are deemed to have contracted on the assumption that there was doubt as to the quantity. The risk with regard to such factor must be considered to have been assumed by the purchaser as one of the elements of the bargain. Alma LeBaron, Jr., 25 IBLA 164 (1976); Lloyd L. Clark, *supra*; John D. Huffman, 7 IBLA 190 (1972).

[3] In legal effect, the BLM's estimates of quantity or quality of a specific lot of timber are sui generis. Quantity or quality cannot be determined with certainty except by harvesting, and even then there is room for disagreement as to whether all the timber is merchantable, and was harvested. Raddue v. LeSage, 138 Cal. App.2d Supp. 852, 292 P.2d 522 (1956); Lloyd L. Clark, *supra*. Thus, appellant cannot claim a refund based on the fact that the quantity of timber available for harvesting turned out to be less than expected.

In this regard, we would note that appellant has objected to the use of a 100 percent cruise method and, for the Fish Creek sale, the 3P method for estimating volume. Appellant contends that BLM should have employed the scaling method. The problem with this argument is twofold. First of all, the method BLM chooses to estimate value is, to a great extent, committed to its discretion. See 43 CFR Subpart 5422. A prospective bidder who does not feel that the method of measurement adequately assesses probable recovery can either choose not

fn. 5 (continued)

It also held, however, that to the extent such timber was not available, no recovery could be granted.

In the instant case, the trees to be cut were either in clear cut areas or were already marked as of the time of the sale. It was not a sale of specific amounts to be taken from a larger quantity nor was there any indication, that appellant was prevented from harvesting any marked tree.

^{6/} We also note, in passing, that the words "more or less" do not appear in the contract itself. Thus the doctrine of merger would also seem to be applicable, though we do not expressly so hold.

to bid or discount its bid by a factor which it feels reflects likely recovery, or conduct its own cruise by its own methods. But where a bidder has been fully informed, in advance, of the methods used to ascertain the estimates of volume and bids in reliance thereon, and that method was, in fact, utilized, that bidder cannot be heard to subsequently complain that the method, itself, was inappropriate.

Secondly, by its very nature a lump sum contract is totally different from a scale sale in which the amount which the vendee pays is expressly related to its recovery. Considering the factual posture of appellant in the instant case, it is understandable why it is desirous to convert the lump sum contract which it signed, to a scale sale. The contract which it entered into, however, was intended to be a lump sum contract. Had the estimates been below the actual amount recovered, the Government could not be heard to argue that the contract should be reformed to increase the return to it. So too, absent fraud or a lack of good faith, appellant is equally bound to the bargain that it made. See Brock v. United States, 84 Ct. Cl. 453 (1937).

[4] Where warranty as to quantity or quality is specifically disclaimed by the Government in a lump sum contract, only good faith is required of the Government in making its estimates. Brawley v. United States, *supra*; Lloyd L. Clark, *supra*. Appellant has made no showing that the Government lacked good faith. While the exact variations between contract estimates and actual recoveries have not been determined, taking the appellant's assertions as true, the variances are between 30 and 37 percent. While there may be situations in which the discrepancy between the cruise estimate and the actual amount recovered may be so great as to require reformation of a contract, the variations alleged herein are not so unusual as to vitiate the Government's express disclaimer. Furthermore, this Board has rejected the argument that the disclaimer is unconscionable and null and void on the basis that not to do so would alter the risk inherent in any sales situation due to differences in bargaining power. See John D. Huffman, *supra*. Indeed, section 6(a) of the contract puts a purchaser on notice that it is the purchaser's examination and attendant valuation which should serve as the predicate of its bid. See Maguire & Co. v. United States, 273 U.S. 67, 69 (1927); United States v. Hathaway, 242 F.2d 897, 900 (9th Cir. 1957).

Insofar as the payment schedule, exhibit B, was based on estimated volumes, we have set forth, *infra*, the express language of that exhibit. Those estimates were designed as a purely administrative tool and did not purport to change or alter the lump sum nature of the sales agreement.

Appellant's claims for refund due to the prices charged for additional timber exceeding the contract prices must also be rejected. Section 8 of each contract provides that the price charged for additional timber shall be determined by the authorized officer of BLM. Each modification was separately approved by appellant, which was under no obligation to agree to the increased price, yet did so of its own volition.

Appellant also makes various claims related to road maintenance and building under the Fish Creek sale. As the District Manager pointed out, there was no representation in the contract that BLM guaranteed that the access roads would be free at all times of rock slides.

The major rock slide on road No. 16-7-33 on December 13, 1977, during a period of heavy rainfall, forced appellant to switch to road No. 17-7-22. We agree that there was no apparent negligence on the part of appellant in precipitating the rock slide. But neither has appellant shown how the Government was to blame. When appellant chose to utilize another route it was properly charged a road maintenance fee for the new route.

Insofar as appellant's claim for compensation because it was required to put rock in excess of what the contract stated, we note, as did the District Manager, that there was no specified amount of rock in either the prospectus or the contract. Rather, there was, in the prospectus an estimated total cost of \$230,149.71.

The District Manager stated that appellant utilized rock in various areas where it was not required under the contract, and suggests that this may be the causative factor in appellant's alleged excess rock. However, we also note that 1,600 cubic yards needed for curve widening and for 30 extra turnouts were inadvertently not included in BLM's estimate. We do not believe that BLM's estimate on road construction is within the scope of the disclaimer relating to the quantity and quality of the merchantable timber. We believe that these two items should have been treated under section 20 of the contract as a design change and appellant should accordingly be refunded \$12,852.

Inasmuch as we have concluded that, taking appellant's assertions as to quantity and quality of timber as true, appellant is not entitled to a refund, there are no disputed issues of fact which would warrant the granting of a hearing, and the request for such is hereby denied.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed, with the exception of the decision in No. 36090-TS5-49, which is affirmed in part, reversed in part, and remanded.

James L. Burski
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Bruce R. Harris
Administrative Judge.

APPENDIX

With respect to Douglas Fir which was the major area of alleged shortages the following chart shows BLM estimates (as adjusted by various modifications compared to appellant's claimed recovery):

<u>Contract No.</u>	<u>BLM Estimate</u>	<u>Claimed Recovery</u>
36090-TS5-49	8,824.5 Mb.f. */	5,525.53 Mb.f.
OR090-TS6-18	8,085.0 Mb.f.	5,317.61 Mb.f. **/
OR090-TS6-60	2,672.6 Mb.f.	1,590.45 Mb.f.
OR090-TS7-8	2,030.4 Mb.f.	1,379.45 Mb.f.

With respect to other types of trees, we have combined the estimates of recovery and claimed recovery for all four sales by type of tree, as follows:

<u>Type</u>	<u>BLM Estimate</u>	<u>Claimed Recovery</u>
Western Red Cedar	1,048.4 Mb.f.	943.68 Mb.f.
Western Hemlock	997.1 Mb.f.	886.59 Mb.f.
Incense Cedar	95.0 Mb.f.	63.89 Mb.f.
White Fir	62.0 Mb.f.	54.09 Mb.f.
Maple	36.0 Mb.f.	18.94 Mb.f. ***/
Alder	24.0 Mb.f.	21.83 Mb.f. ***/

*/ thousand board feet

**/ This amount could only be extrapolated from various data provided by appellant. Its letter of June 20, 1978, lumped together modifications 2, 3, and 4, noting a total estimated recovery of 26,400 b.f. Actually, however, modification No. 3 involved .4 Mb.f. of western red cedar. The total recovery of western red cedar, which appellant alleged, based only on the initial contract and modification No. 1, was 458.71 Mb.f. This was also the total amount scaled by the Columbia River Log Scaling and Grading Bureau for the entire cut. Based on applicant's submissions it must be assumed that there was no recovery of western red cedar under modification No. 3.

***/ In the Poodle Creek sale, recovery for maple and alder was combined, with a shortage of 4.34 Mb.f. resulting. This has been divided in half and apportioned between the two types.

June 2, 1981

IBLA 79-127, 54 IBLA 309 (1981) : 36090TS5-49, ORO90-TS6-18,
: ORO90-TS6-60, ORO90-TS7-8
GREGORY LUMBER CO, INC. :
: Petition for Reconsideration;
: and Motion for Clarification
:
: Petition granted; Motion
: granted; Prior decision
: reaffirmed as clarified

ORDER

By decision dated April 30, 1981, the Board decided the above captioned consolidated appeal, which related to four timber sales contracts entered into between appellant and BLM. The Board's decision was styled Gregory Lumber Co., Inc., and it is reported at 54 IBLA 309. While the Board did order that appellant be refunded a total of \$12,852 due to excess rocking requirements, the Board denied appellant's main claims for refunds based on an alleged deficiency in the amount of timber actually harvested compared to that estimated by the Government.

On May 12, 1981, appellant filed a motion for reconsideration of the Board's decision and requested that the Board vacate its determination on the grounds, inter alia, of lack of due process, mistake, and pendency of proceedings before the United States Court of Claims. On May 22, 1981, the Assistant Regional Solicitor responded, generally in opposition to appellant's motion, but requesting clarification of one portion of the Board's decision. In order to dispel any future questions concerning this Board's original decision, and in order to examine appellant's contentions in its motion to reconsider, the Board hereby grants that motion. Inasmuch as appellant's petition covers the precise area on which the Government also seeks clarification we will examine the points raised in appellant's petition.

Initially, appellant alleges that the Board's procedures utilized in the instant case violated procedural and substantive due process. It supports this contention by an allegation that a stay had been entered in this matter by the Board and that appellant had received no notification that the stay had been lifted.

In point of fact, appellant does not direct our attention to any decision or order issuing a stay in this matter, since no such decision or order exists. As our April 30, 1981, decision noted, there was some question concerning the proper forum, within the Department,

54 IBLA 320A

to hear these appeals. Thus, with respect to the instant four contracts, as well as seven other cases, appellant filed appeals with both IBLA and the Interior Board of Contract Appeals (IBCA). On February 6, 1979, the Assistant Regional Solicitor noted that the cases involved in IBLA 79-127, were also the subject of appeals in IBCA 1237-12-78 through 1240-12-78, pending before the IBCA, and stated "[i]n view of this it is our belief that it would be appropriate to stay proceedings before the Board of Land Appeals for a period of six months and to re-examine the status of these appeals at that time.

While the Board never granted this motion, it did informally stay further action on the appeal, deferring to the initial judgment of IBCA on the proper forum for appellate review of these disputes. As our April 30 decision noted, the Board of Contract Appeals, in two decision both styled as Appeals of Gregory Lumber Co., Inc., and reported at 13 IBCA 71 (1979), and 13 IBCA 128 (1980), determined that insofar and these timber sales contracts were concerned, appellant could not proceed under the Contract Disputes Act, 92 Stat. 2382, 41 U.S.C. §§601-603 (Supp. II 1978), and thus had no remedy before IBCA. These appeals were dismissed with prejudice.

We wish to juxtapose what subsequently occurred in the four sales contracts involved herein with what transpired in the other seven appeals which appellant had brought. Those appeals, unlike the four consolidated appeals which this Board decided, were dismissed without prejudice by IBCA, owing to uncertainty over whether timber sale contracts were subject to the Contract Disputes Act, a question to which this Board alluded in its April 30, 1981, decision. See 54 IBLA at 310-312. This Dismissal Order was issued by IBCA on March 12, 1980.

On April 14, 1980, appellant adverted to this action, noted that there were two cases presently pending before the Court of Claims which would be determinative of the jurisdictional question, and requested that IBLA authorize a delay in filing of statements of reasons relating to these appeals. ^{1/} On May 14, 1980, with express reference to these seven cases, the Board extended the time for the submission of a statement of reasons until after a decision by the Court of Claims in the two cases pending before it (Everett Plywood Corp. v. United States, Ct. Cl. No. 199-75, and Webbco Lumber Co. v. United States, Ct. Cl. No. 491-79). There was no reference in either appellant's request or this Board's order to any of the four contracts or appeals which were involved in our April 30 decision.

While appellant may have assumed that it would be notified by this Board before further action would occur, this assumption was in no way generated by actions of this Board. Nor has appellant shown in any manner how it was actually injured by its failure to receive such

1. We note that, in the four cases which were decided by this Board, the statement of reasons had been filed on January 10, 1979.

notice. Four separate and detailed statements of reasons for appeal had been filed, and each was substantively considered in the Board's decision. Indeed, while it makes generalized allegations that had it received such notice it would have made further filings, it has yet to provide the Board with a specific example of facts which it deems not to have been considered by the Board. Thus, appellant argues that "based on the uncorroborated and unsupported documents in the Department of Interior file, without notice to appellant, the Board rendered a decision reciting facts which were apparently gleaned from those documents or some other sources." We would point out that the official case files are subject to official notice pursuant to 43 CFR 4.24(b), that the case files were at all times available for inspection to one fact or document which it wishes to challenge. Moreover, as we will fully explicate infra, this whole argument is a canard since the Board's decision assumed, arguendo, that the facts were as appellant stated.

To the extent that this argument is related to matters of legal interpretation, appellant has failed to show any error in the legal conclusions reached by the Board. Having been apprised of the Board's view of the legal questions, it should have been a simple matter for appellant to correct what it deemed to be misinterpretations. This, appellant has not attempted to do in its petition.

Two other arguments which appellant presses are basically intertwined. First, appellant argues that it has a constitutional due process right to a hearing which was ignored by this Board's decision. Appellant argues that it "was not even given the opportunity to respond to the government's submissions or notice that the stay had been lifted in these appeals which concern Gregory's vital property interests." Second, appellant argues that the Board's statement that "there are not disputed issues of fact which would warrant the granting of a hearing" was unfair and unreasonable.

Inasmuch as the Government did not file an answer in the instant appeal, we find it difficult to determine the gravamen of appellant's concern as it relates to the "government's submissions." It is, of course, possible that it is referring to BLM's administrative file, but as noted above, not only was there nothing improper in its utilization, appellant has yet to point out specific error therein. With respect to its constitutional argument, while courts have long recognized the right of individuals to notice and opportunity for a fact-finding hearing prior to deprivation of property rights, no such requirements exists where disputed facts are not relevant to the resolution of legal questions.

In the instant case, the Board was fully aware that there was disputes between the Government and appellant and to both the existence and extent of any underage in timber harvested over that estimated. For the purposes of its decision, however, the Board noted that, even assuming that all of the appellant's factual allegations were correct and capable of proof, appellant would not be entitled to a recovery. It seems passing strange to contend that when the Board has already

determined that, considering the case in the light most favorable to an appellant, judgment must be had for the Government, the Board should nevertheless order a hearing which will be productive of greater costs for both appellant and the Government, but which cannot, even if appellant is successful in establishing its position on every single factual dispute, alter the outcome of the case. We know of no rule of constitutional jurisprudence or elementary logic which would necessitate such an approach. Having determined that, assuming every fact was as stated by appellant, appellant could not prevail in its appeal, this Board correctly denied the request for a fact-finding hearing. The Board did not, however, purport to find either that no facts were disputed or that appellant had established that the facts were as it contended.

Finally, appellant alleges that the Board's decision "seeks" to oust the Court of Claims of jurisdiction. First of all, inasmuch as this Board was never even informed that these cases were before the Court of Claim, it could scarcely be said that the Board attempted to oust the jurisdiction of the Court of Claims. But, even had the Board known that this matter was pending before that Court, we know of no rule of law which would require that we suspend our consideration.

As a practical matter, where parties to an appeal inform the Board that the matter is simultaneously pending before the Federal judiciary, this Board will normally defer to the court and suspend consideration of such an appeal. This action, however, is not based on a view that the Board is without jurisdiction to act further; rather, it is based both on concepts of comity and the realization that the judicial action may preclude the necessity for any action by this Board.

The instant case presents a different factual framework from that which the Board normally encounters. This Board had already rendered its decision and we do not perceive how either of the considerations which normally compel this Board to defer to the jurisdiction of the Federal courts would be advanced by a withdrawal of our decision. As we have indicated above, appellant had failed to convince us that the earlier decision was either procedurally or substantively in error. The Board of Contract Appeals did not rule on the substantive issues under the Contract Disputes Act. If this decision is affirmed by the Court of Claims and, in the interim, we have vacated our decision, it would be necessary for the Court of Claims to remand the matter to the Department so that appellant could exhaust its administrative remedies and obtain a substantive ruling on the merits of its appeal. This step would be avoided only if the Board did not recall its decision, for, as the Assistant Regional Solicitor notes, the Court of Claims would undoubtedly consider the Board's decision as part of the record of the case and thus could simultaneously dispose of both the procedural and substantive matters raised therein.

Thus, as we perceive the matter, the instant decision may actually advance ultimate resolution of appellant's claims, and thus it would be counterproductive to vacate it.

We have also considered the arguments raised in appellant's supplemental motion to vacate, which we received on June 1, 1981. We see no reason to change the views which we have enunciated herein.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition to reconsider the decision of the Board styled Gregory Lumber Co., Inc., 54 IBLA 309 (1981), is granted, and that decision, as clarified herein, is reaffirmed.

James L. Burski
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Bruce R. Harris
Administrative Judge

APPEARANCES:

Edward F. Canfield, Esq.
Casey, Scott & Canfield
420 Washington Building
1435 G Street, N.W.
Washington, D.C. 20005

Donald P. Lawton, Esq.
Assistant Regional Solicitor
Pacific Northwest Region
500 N.W. Multnomah Street, Suite 607
Portland, Oregon 97232

